

December 1941

Discussion of Recent Decisions

C. C. McCullough

D. A. Esling

J. Honoroff

D. J. Ryan

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

C. C. McCullough, D. A. Esling, J. Honoroff & D. J. Ryan, *Discussion of Recent Decisions*, 20 Chi.-Kent L. Rev. 99 (1941).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol20/iss1/4>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price \$2.00 per year Single copies, 75c Foreign subscription, \$2.50

EDITORIAL BOARD

Editor-in-Chief
ARTHUR H. WEST

Associate Editor
BERNARD LURIE

STAFF

M. LEONARD GOODMAN

CHESTER C. McCULLOUGH

RUTH MARKMAN

Case Editors

H. BARBOUR
D. A. ESLING

A. W. FORBES

J. HONOROFF
D. J. RYAN

BOARD OF MANAGERS

JAMES R. HEMINGWAY, *Chairman and Faculty Adviser*

GEORGE S. STANSSELL

DONALD CAMPBELL

GEORGE KLOEK

WALTER L. SCHLEGEL, JR.

The College assumes no responsibility for any statement
appearing in the columns of the REVIEW.

VOLUME 20

DECEMBER, 1941

NUMBER 1

DISCUSSION OF RECENT DECISIONS

CHattel Mortgages — RIGHTS AND REMEDIES OF CREDITORS — EFFECT OF DELAY IN FILING OR RECORDING.—In *Illinois National Bank & Trust Company v. Holmes*,¹ the validity of a chattel mortgage as affecting the rights of third persons was considered under a set of facts which disclosed that one Lewis was indebted to the plaintiff and, evidencing that indebtedness, had signed two notes for the security of which, he also gave a chattel mortgage upon certain livestock. These notes, the mortgage, and the certificate of acknowledgment of said mortgage, were dated July 11, 1940, but were, in fact, signed, acknowledged, and delivered by Lewis on July 20, 1940, and the mortgage was recorded on July 23, 1940. Subsequent to the date of recording, the defendant, Holmes, recovered a judgment against the mortgagor, and, upon execution, levied upon the livestock described in the chattel mortgage. In proceedings thereupon brought to try the right of property as between the mortgagee and the judgment creditor, the latter insisted that the chattel mortgage was void as to him by reason of noncompliance with Section 4 of the Illinois Mortgages Act,² contending that the ten-day period of recording required

¹ 311 Ill. App. 286, 35 N.E. (2d) 823 (1941).

² Ill. Rev. Stat. 1939, Ch. 95, § 4, which reads in part: "No mortgage, trust

therein should be measured from the stated date of the instrument rather than from the actual date of execution. In both the trial and appellate courts, however, it was held that the act in question had been complied with since the period is to be measured from the date of "execution." Hence, the better right to the property was found to be in the mortgagee.

This particular problem under the statute in question had not arisen prior to the instant case, though the statute, in general, had been before the court in *Collateral Finance Company v. Braud*.³ There the court commented as follows:

"The legislature thus created a new condition precedent for the validity of a chattel mortgage against the creditors of the mortgagor, namely, the filing of the mortgage within ten days of its execution. Under the present statute, as amended in 1931, section 1 of the act refers to the *rights of third persons*, while section 4 refers to the validity of mortgages on personal property, *as against the creditors of the mortgagor*, and seemingly creates new rights for a limited class of persons, namely, creditors. In the light of the history of the chattel mortgage legislation in this State, the amendment of section 4 in 1931 was obviously enacted to protect general creditors from the indeterminate secret lien of an unrecorded chattel mortgage, and limited the time during which such lien might remain secret to ten days after the mortgage was executed."⁴

In addition to such expression of policy, it is also the rule in Illinois that, for a chattel mortgage to be valid against third parties, strict compliance with the statute is necessary.⁵ The question then becomes one requiring determination as to which date must control, i.e., the stated date or the actual date of execution. The Illinois court in the instant case, decides that the actual date of execution is the one intended by the legislature.

The holding in the instant case is also in keeping with the interpretations made of substantially similar statutes in other states. Thus in *Fenby v. Hunt*,⁶ a Washington case, it appeared that a chattel mortgage had been dated December 9, 1907, but was not delivered to the

deed or conveyance of personal property having the effect of a mortgage or lien upon such property hereafter executed shall be valid as against the creditors of the mortgagor, even though admitted to record, as hereinafter provided, unless it shall be deposited for filing or recording in the office of the recorder of deeds of the proper county within ten days of its execution. . . ." The act was again amended in 1941, Laws 1941, p. 874; Ill. Rev. Stat., 1941, Ch. 95, § 4, but not so as to affect the instant problem.

³ 298 Ill. App. 130, 18 N.E. (2d) 392 (1938). See note in 17 CHICAGO-KENT LAW REVIEW 177.

⁴ *Collateral Finance Co. v. Braud*, 298 Ill. App. 130, at p. 136, 18 N.E. (2d) 392, at p. 394 (1938).

⁵ *Southern Surety Co. v. Peoples State Bank*, 243 Ill. App. 195 (1926); *Kennedy Furniture Co. v. Griffin*, 194 Ill. App. 530 (1915); *Blatchford v. Boyden*, 122 Ill. 657, 13 N.E. 801 (1887).

⁶ 53 Wash. 127, 101 P. 492 (1909).

mortgagee until December 13, 1907, and was filed in the auditor's office on December 21, 1907. The court held that a provision of the local statute requiring it to be filed "within ten days from the time of the execution thereof," was complied with, saying: "The execution of a chattel mortgage means and includes the doing of those formal acts necessary to give the instrument validity as between the parties. There certainly could be no validity to a mortgage without a delivery and acceptance."⁷ Similar decisions, on comparable facts, may be found in Alabama,⁸ Indiana,⁹ Massachusetts,¹⁰ and Nebraska,¹¹ in all of which cases the controlling date is regarded as the date of *execution*. On that score the court said in the instant case:

"The word 'execution' when used in its proper sense conveys the meaning of carrying out some act or course of conduct to its completion, and when applied to a written instrument includes the performance of all acts which may be necessary to render it complete as an instrument, or to give the instrument validity or to carry it into effect. In common parlance, the word 'execution' may mean the signing alone, but in a legal or technical sense, the word when used in reference to a conveyance, necessarily includes signing, sealing and delivery."¹²

That such should be the proper meaning to be given to the term as used in the controlling statute has long been established in Illinois,¹³ and is substantially the weight of authority throughout the United States.¹⁴ Moreover, it is well settled that the actual date of the execution and delivery of a deed or instrument may be shown by parol testimony.¹⁵ It would, therefore, seem that the decision in the instant case must be

⁷ Fenby v. Hunt, 53 Wash. 127, at p. 130, 101 P. 492, at p. 494.

⁸ Arrington v. Arrington, 122 Ala. 510, 26 So. 152 (1899).

⁹ Hornbrook v. Hetzel, 27 Ind. App. 79, 60 N.E. 965 (1901).

¹⁰ Folsom v. Clemence, 111 Mass. 273 (1873); Shaughnessey v. Lewis, 130 Mass. 355 (1881).

¹¹ Solt v. Anderson, 67 Neb. 103, 93 N.W. 205 (1903); Wells v. Lamb, 19 Neb. 355, 27 N.W. 229 (1886).

¹² Illinois Nat. Bank & Trust Co. v. Holmes, 311 Ill. App. 286, at p. 292, 35 N.E. (2d) 823, at p. 825 (1941). That signing alone may be enough, see George v. Haas, 311 Ill. 382, 143 N.E. 54 (1924).

¹³ Hathaway v. Cook, 258 Ill. 92, 101 N.E. 227 (1913); Fitch v. Miller, 200 Ill. 170, 65 N.E. 650 (1902); Hunt v. Weir, 29 Ill. 83 (1862); Crosier v. Crosier, 201 Ill. App. 406 (1916); Johnson v. Prosperity L. & B. Assn., 94 Ill. App. 260 (1901); Houfes v. Schultze, 2 Ill. App. 196 (1878).

¹⁴ Farrior v. New England Mortgage Security Co., 88 Ala. 275, 7 So. 200 (1890); Hill v. Nelms, 86 Ala. 442, 5 So. 796 (1889); Le Mesnager v. Hamilton, 101 Cal. 532, 35 P. 1054, 40 Am. St. Rep. 81 (1894); Einstein's Sons v. Shouse, 24 Fla. 490, 5 So. 380 (1888); Watkins v. Nugen, 118 Ga. 372, 45 S.E. 262 (1903); Collins v. Cornwell, 131 Ind. 20, 30 N.E. 796 (1892); Smith v. James, 131 Ind. 131, 30 N.E. 902 (1892); First Nat. Bank v. Quevli, 182 Minn. 238, 234 N.W. 318 (1931); Smith v. Williams, 38 Miss. 48 (1859); Brown v. Westerfield, 47 Neb. 399, 66 N.W. 439, 53 Am. St. Rep. 532 (1896); Rogers v. Head's Iron Foundry, 51 Neb. 39, 70 N.W. 527, 37 L.R.A. 429 (1897); Fire Ass'n of Philadelphia v. Ruby, 60 Neb. 216, 82 N.W. 629 (1900); Keenan v. Keenan, 12 N.Y.S. 747 (1890); Fenby v. Hunt, 53 Wash. 127, 101 P. 492 (1909); Jones, Mortgages (10th ed.), p. 100, § 84.

¹⁵ Greenebaum v. Gage, 61 Ill. 46 (1871); Blake v. Fash, 44 Ill. 302 (1867); Weissbrodt v. Elmore & Co., 262 Ill. App. 1 (1931). See also Woolsey v. Jones,

regarded as the correct one, especially since it cannot be presumed that the legislature, when drafting Section 4 of the Mortgages Act was unaware of these settled principles, or of the construction which similar statutes had received in the courts of other states.

In the light of the history of this provision, however, a different purpose and a different choice of words might have been expected. From 1874 to 1921, the statute declared that every chattel mortgage acknowledged and recorded, if otherwise bona fide, was good and valid against everybody from the time of filing for record, without regard to the date of filing.¹⁶ In 1921, apparently with the intention of forcing mortgagees to record these chattel mortgages within ten days, the legislature enacted an amendment to the chattel mortgage act, then known as section 4a, providing that no mortgage should be valid against the creditors of the mortgagor, unless it should be filed within ten days of its execution.¹⁷ The amendment was held unconstitutional, in *Nelson v. Hoffman*,¹⁸ on technical grounds. In 1931, the legislature re-enacted a similar provision observing the criticisms expressed by the Supreme Court in the Nelson case, but still apparently imbued with the same purpose as before. It was this provision which caused the Illinois Appellate Court, in *Collateral Finance Company v. Braud*,¹⁹ to remark: "The legislature thus created a new condition precedent for the validity of a chattel mortgage against the creditors of the mortgagor . . . and seemingly creates new rights for a limited class of persons, namely, creditors."²⁰

As currently interpreted, however, the question arises: Of what greater value is the record, now, to a subsequent creditor than it was before such amendment? Would not the legislature have served the purpose of this creditor class more soundly by using the expression "date thereof" rather than the word "execution"? The section now gives even less protection to the creditor than did the former provision which made all unrecorded instruments null and void as to third persons without notice. In fact, it leaves the door open to possible fraud, by permitting the mortgagor and mortgagee to connive upon the device of a chattel mortgage deliberately kept unrecorded until the creditor's rights have arisen and then, upon apt filing within ten days thereof, to assert that the same was in fact "executed" but recently and hence available to block recovery on the creditor's judgment. Legislative re-examination of the problem seems desirable.

C. C. McCULLOUGH

84 Ala. 88, 4 So. 190 (1888); *McFall v. Murray*, 4 Kan. App. 554, 45 P. 1100 (1896); *Grove v. Great Northern Loan Co.*, 17 N. D. 352, 116 N.W. 345, 138 Am. St. Rep. 707 (1908).

¹⁶ Laws, 1874, p. 711.

¹⁷ Laws, 1921, p. 570.

¹⁸ 314 Ill. 616, 145 N.E. 688 (1924).

¹⁹ 298 Ill. App. 130, 18 N.E. (2d) 392 (1938).

²⁰ *Ibid* 298 Ill. App. 130, at p. 136, 18 N.E. (2d) 392, at p. 394.

INTOXICATING LIQUORS—REVIEW—DOES APPELLATE COURT HAVE JURISDICTION TO REVIEW ORDERS OF CIRCUIT COURT IN LIQUOR LICENSE PROCEEDINGS?—In 1934 the Illinois legislature passed the Liquor Control Act¹ which provided in detail the manner by which liquor licenses are granted and revoked. In certain cases, the power to revoke a liquor license is vested in the local liquor control commissioner.² The statute provides that review of the decision of the local liquor control commissioner may be had by appeal to the state liquor control commission³ whose decisions are in turn subject to review by the circuit court.⁴ The act is silent as to further procedure. In the recent case of *City of Freeport v. Kaiser*⁵ before the Appellate Court of Illinois, the issue was squarely presented whether the decision of the circuit court, when acting as an appellate tribunal pursuant to the provisions of the Liquor Control Act, was subject to further review. It was held that no further review was possible as the Appellate Court was without jurisdiction to consider the case.

In arriving at that decision the court was first obliged to determine whether the provisions of the Illinois Civil Practice Act regarding appellate review of civil causes⁶ conflicted with the provisions of the act creating the appellate courts and conferring on them jurisdiction to review final judgments "in any suit or proceedings at law or in chancery other than criminal cases."⁷ The broad language of the former, permitting appeal in cases where any form of review may be allowed by law, was regarded as qualified by the narrower wording of the latter, and required, therefore, a determination as to whether or not the action of the circuit court in considering an appeal in a liquor license case was a "suit or proceedings at law or in chancery" upon which further review would be possible. By deciding that the limited reviewing power conferred upon the circuit courts under the Liquor Control Act was a statutory proceeding not covered by the quoted language and finding no express

¹ Ill. Rev. Stat. 1941, Ch. 43.

² Ill. Rev. Stat. 1941, Ch. 43, § 149. "The local commission may revoke any license issued by it if it determines that the licensee has violated any of the provisions of this Act"

³ Ill. Rev. Stat. 1941, Ch. 43, § 153. "Except as hereinafter provided, any order or action of a local commission granting or refusing to grant a license, revoking or refusing to revoke a license or refusing to grant a hearing upon a complaint to revoke a license may within twenty (20) days after notice of such order or action be appealed from by any resident of the political subdivision under the jurisdiction of such local commission or any person interested, to the State commission, in which event the matter of the propriety of such order or action of such local commission shall be tried de novo as expeditiously as the circumstances permit."

⁴ Ill. Rev. Stat. 1941, Ch. 43, § 154. "Appeal from any decision of the State commission . . . shall lie to the Circuit or Superior Court of the county in which the premises licensed, or proposed to be licensed, are situated."

⁵ 311 Ill. App. 197, 35 N.E. (2d) 722 (1941).

⁶ Ill. Rev. Stat. 1941, Ch. 110, § 201(1).

⁷ Ill. Rev. Stat. 1941, Ch. 37, § 32. Since the amendment of 1935 (Laws 1935, p. 695) was enacted later, it was regarded as controlling, under the authority of *City of Chicago v. Chicago Great Western Railroad Co.*, 348 Ill. 193, 180 N.E. 835 (1932).

warrant for additional review by any than the circuit court, the Appellate Court was forced to the conclusion that the legislative intent was to terminate such proceedings earlier than would be the case in ordinary civil litigation. For the same reasons, writ of error was likewise regarded as unavailable.⁸

There can be little doubt but that the legislature has the power to provide the manner in which the decisions of the liquor licensing authority are to be reviewed.⁹ It is equally clear that if the legislature had desired to deny the right to further review it could have so provided without running the risk of violating the constitutional requirement of due process.¹⁰ If, therefore, silence is to be regarded as the equivalent of a negation of further review, then the decision is in harmony with the generally accepted doctrine that in matters concerning liquor licenses, in the absence of statute, no appeal lies from the licensing authority.¹¹

The case, however, contains within itself an implication that cannot be permitted to pass unnoticed. If the Illinois Appellate Court is willing to hold that review by the circuit court is an administrative, and not a judicial act, then further review thereof can certainly logically be denied. Other courts have resorted to this reasoning to obtain that result.¹² But, if the Illinois Appellate Court were to so hold, it would be endangering the constitutionality of the appeal provisions of the Liquor Control Act, for it has been held that to impose administrative functions on the judicial department would violate Article III of the Illinois Constitution.¹³

It is true that under a somewhat similar situation a Utah court has said that liquor license proceedings are "special, summary, administrative, and inseparable from the sovereignty of the state — a power conferred on the district court as a mere agent of the state, exercising police powers of the state."¹⁴ It has also been stated that in the United States it is generally regarded that the revocation of a liquor license is an administrative, and not a judicial proceeding.¹⁵

⁸ McCormick v. Meisenheimer, 337 Ill. 65, 168 N.E. 685 (1929). The Freeport Motor Casualty Co. v. Madden, 354 Ill. 486, 188 N.E. 415 (1933).

⁹ Malkan v. The City of Chicago, 217 Ill. 471, 75 N.E. 548, 2 L.R.A. (N.S.) 488 (1905).

¹⁰ People ex rel. Fitzgerald v. Harrison, 256 Ill. 102, 99 N.E. 903, Ann. Cas. 1913E 362 (1912).

¹¹ See note, Ann. Cas. 1917A 1024, "Right to and Effect of Judicial Review of Revocation of Liquor License."

¹² Londry's Appeal, 79 Conn. 1, 63 A. 293 (1906); Cole's Appeal, 79 Conn. 679, 66 A. 508 (1907); Hernandez v. State, 135 S.W. 170 (Tex. Civ. App., 1911); State ex rel. City of Aberdeen v. Superior Court of Chehalis County, 44 Wash. 526, 87 P. 818 (1906); State ex rel. City of Puyallup v. Superior Court of Washington for Pierce County, 50 Wash. 650, 97 P. 778 (1908).

¹³ Ill. Const. 1870, Art. III, reads, "The powers of the government of this state are divided into three distinct departments — the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others" See also City of Aurora v. Schoeberlein, 230 Ill. 496, 82 N.E. 860 (1907); Borreson v. Department of Public Welfare, 368 Ill. 425, 14 N.E. (2d) 485 (1938).

¹⁴ In re Grant, 44 Utah 386, 140 P. 226 (at p. 230), Ann. Cas. 1917A 1019 (1914).

¹⁵ 2 Am. Jur., Appeal and Error, § 18, p. 857.

In that light it becomes important then to determine whether the circuit court acted in an administrative or judicial capacity. To determine whether an action is judicial or administrative both the history of the subject and the nature of the issue involved must be considered.¹⁶ In the instant case the circuit court, in order to determine the validity of the commission's order, was obliged to review the transcript of the liquor law violation proceedings before a justice of the peace which was the fundamental basis for the order. This would tend to indicate that the circuit court acted in a judicial capacity. There is at least one well considered case¹⁷ holding that a constitutional court cannot divest itself of its judicial character and must, therefore, act judicially when revoking a liquor license. The circuit courts of Illinois are clearly constitutional courts.¹⁸ If then, the circuit court acted judicially in the case under consideration, it would seem that it would be more in harmony with our system of laws to hold that, in the absence of legislative fiat to the contrary, appropriate review should be allowed in all appropriate courts under the general provisions of the Civil Practice Act and the Appellate Court Act.¹⁹ The Illinois Supreme Court under a somewhat similar set of circumstances arising under the Workman's Compensation Act allowed an appeal.²⁰

Though the Liquor Control Act calls the proceedings in the circuit court an "appeal" its intrinsic nature is that of the common law judicial remedy of certiorari²¹ upon which appellate review by higher tribunals is undoubtedly permitted,²² as it falls clearly within the statutory description of a "suit or proceeding at law." It should then hardly be doubted that the circuit court acted in a judicial capacity in reinstating the liquor license in the instant case.²³ As a necessary corollary to such a holding it would seem that additional review in the higher courts would have been proper.

D. A. ESLING

¹⁶ *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 S. Ct. 595, 48 L. Ed. 894 (1904); *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908); *Klafter v. State Board of Examiners of Architects*, 259 Ill. 15, 102 N.E. 193, Ann. Cas. 1914B 1221 (1913).

¹⁷ *State ex rel. Arnold v. Lichta*, 130 Mo. App. 284, 109 S.W. 825 (1908).

¹⁸ Ill. Const. 1870, Art. VI, §§ 12 to 17 inclusive.

¹⁹ Ill. Rev. Stat. 1941, Ch. 110, § 201 (1); Ill. Rev. Stat. 1941, Ch. 37, § 32.

²⁰ *Christensen v. Bartelmann Co.*, 273 Ill. 346, 112 N.E. 686 (1916).

²¹ The court decided the proceeding was not true certiorari since the circuit court, under the act, is not limited to merely quashing the proceedings or the writ, but may remand with directions to receive rejected evidence and enter a new order. Ill. Rev. Stat. 1941, Ch. 43, § 154.

²² *State ex rel. Sholund v. Mayor and Com. Council of City of Duluth*, 125 Minn. 425, 147 N.W. 820 (1914); *Croot v. Board of Trustees of Town of Manitou*, 20 Colo. App. 254, 78 P. 313 (1904); *Carr v. City Council of Augusta*, 124 Ga. 116, 52 S.E. 300 (1905); *Dziok v. Board of License Commissioners of Central Falls*, 28 R. I. 526, 68 A. 479 (1908); *People ex rel. Silkens v. McGlyn*, 62 Hun 237, 16 N. Y. S. 736 (1891), affirmed in 131 N. Y. 602, 30 N. E. 864 (1892).

²³ *State v. Corron*, 73 N. H. 434, 62 A. 1044, 6 Ann. Cas. 486 (1905).

PROCESS — PERSONAL SERVICE — WHETHER PERSONAL SERVICE IS INVALID IF MADE ON SUNDAY—The issue of whether personal service of a summons, if made on Sunday, is valid was squarely presented to the Supreme Court of Illinois in the case of *Pedersen v. Logan Square State & Savings Bank*,¹ and that body, reversing the lower courts, upheld the service as valid on the basis that service of process is a mere ministerial function, is not a judicial act, and, in the absence of specific statutory prohibition,² is not within the canon that judicial acts may not be performed upon a nonlegal day.

From a technical point of view the weight of authority holds that service of civil process is a ministerial act and not a judicial one.³ The common law apparently did not prohibit service of an original process on Sunday,⁴ and no express statute exists in Illinois on the subject.⁵ Although it was reasoned by the Appellate Court that a violation of a criminal statute⁶ should not be sanctioned by taking cognizance of a civil service seemingly made in violation thereof,⁷ the applicability of such statute was rejected in the instant case. From a practical point of view, the decision seems in harmony with the spirit of the times.

D. A. ESLING

SALES — WARRANTIES — WARRANTY OF MERCHANTABILITY WHEN FOODS ARE SOLD UNDER TRADE NAME—In *Botti v. Venice Grocery Company*¹ the plaintiff purchased macaroni in a sealed package from the defendant, a retail grocer, asking for the package by its trade name. Several members of the plaintiff's family became ill as a result of eating the macaroni. The plaintiff sued on a theory of implied warranty, predicated his action on subsection (1) of Section 17 of the Massachusetts Sales Statute,²

¹ 377 Ill. 408, 36 N.E. (2d) 732 (1941), reversing 309 Ill. App. 54, 32 N.E. (2d) 644 (1941). See note in 19 CHICAGO-KENT LAW REVIEW 278.

² The English statute of 29 Car. II, c. 7, s. 6 in referring to Sunday service reads, "that the service of every such writ shall be void to all intents and purposes." See *Taylor v. Phillips*, 3 East 155, 102 Eng. Rep. 556 (1802); *Roberts v. Monkhouse*, 8 East 547, 103 Eng. Rep. 453 (1807). The above statute is not in force in Illinois; see Ill. Rev. Stat. 1941, Ch. 28, § 1.

³ 19 CHICAGO-KENT LAW REVIEW 278, 279 note 7; In re *Worthington*, Fed. Cas. No. 18,051 (1877), in which the circuit clerk filed the docket transcript of a judgment on a Sunday and the court held this to be a ministerial act and not void. In *Matthews v. Ansley*, 31 Ala. 20 (1857), service of notice of attachment was made on a Sunday and held valid as a ministerial act.

⁴ There was no prohibition at common law against the performance of ordinary labor on Sunday according to *Rex v. Brotherton*, 2 Strange 702, 93 Eng. Rep. 794 (1726). See also *Eden v. People*, 161 Ill. 296, 43 N.E. 1108, 32 L.R.A. 659 (1896).

⁵ The court in the instant case, held that Ill. Rev. Stat. 1941, Ch. 110, § 259.4(3), which reads: "If practicable summons shall be served 20 days before the first return day mentioned therein, but it may be served at any time [italics supplied] on or before the return day," was an express indication to the contrary.

⁶ Ill. Rev. Stat. 1941, Ch. 38, § 549.

⁷ The Appellate Court relied on *Scammon v. City of Chicago*, 40 Ill. 146 (1866).

¹ 35 N.E. (2d) 491 (Mass., 1941).

² Mass. G. L. (Terr. Ed.) Ch. 106, § 17 (1).

which corresponds to that of the uniform act.³ The subsection provides in effect that where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. The court allowed a recovery, not on clause (1), above, but on clause (2) of the section, which provides that "when goods are bought by description from a seller who deals in goods of that description . . . there is an implied warranty that the goods shall be of merchantable quality." The court held that a recovery under clause (1) was precluded by clause (4) of the section, which provides that "in the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

Before the adoption by the states of the Uniform Sales Act, the common law recognized an exception to the doctrine of caveat emptor in cases of foods bought for immediate consumption and held the seller to an implied warranty that the goods were fit and wholesome as food.⁴ However, the exception to the rule was often not applied where the food was bought in a labelled sealed container.⁵ Since the warranty was imposed on the seller because the buyer relied on the seller's judgment, the theory was that there was no element of reliance in the sale of a sealed package. The Sales Act, in prohibiting recovery on a warranty of fitness for a particular purpose in sales by trade name, codified the rule of the common law that there is no warranty respecting a sale of known, described and definite articles as to fitness for a particular purpose. After the adoption of the Sales Act, which makes no distinction between sales of food and other goods, many American courts extended the warranty to cases of food sold in sealed packages. Some, however, still followed the common law rule as to articles other than food and refused a recovery on implied warranty where the food could not be inspected by the seller.

When dealing with a sale of foodstuffs by trade name, the courts have evolved several constructions of the Sales Act to overcome the express language of the statute negating a warranty of fitness for a particular purpose. While some of the courts construe the statute so as to deny recovery, the majority, in sales of foodstuffs by trade name, allow a recovery on a warranty.⁶ Some of the latter courts conclude from the facts of the case that, while the article may have a trade name, its sale was not one by trade name, because the buyer still relied on the seller to make the selection of the goods.⁷

³ 1 U.L.A., Sales, 103.

⁴ Williston, Sales (2d Ed.) I, 480, § 242; see cases cited under footnote 10 of that section.

⁵ See annotation in 90 A.L.R. 1269.

⁶ Robert C. Brown, "Liability of Retail Dealers for Defective Foodstuffs," 23 Minn. L. Rev. 585 (1939).

⁷ See discussion of *Ralston Purina Co. v. Novak*, 111 F. (2d) 631 (1940), in 18 N.Y.U.L.Q. Rev. 271.

The theory evolved by the Massachusetts court in the instant case avoids the prohibition in subsection (4), heretofore quoted, by holding that, although the sale may in fact be one by trade name, nevertheless a warranty of merchantability is not thereby precluded. The warranty of merchantability is considered in such cases as one of fitness for a general purpose. Merchantable quality in this sense means that the goods are inherently good enough to pass under their description. This is a comparatively recent construction of the term which ordinarily has meant salability or fitness for resale. The warranty is distinguished from that of fitness for a particular purpose. The latter warranty is held to apply where the buyer makes known to the seller the particular purpose for which he intends to use the goods. The warranty of merchantability is held, in contrast, to mean not only that the article is salable, but also that it is fit for the purpose for which such goods are generally used. Thus, while an article may not fit the particular purpose for which the buyer purchased the article, it may still be merchantable in that it may meet the general requirements of quality reasonably expected.

Subsection (4) says that if the article is sold by trade name there is no implied warranty that the article shall be fit for any particular purpose, but it does not negative an implied warranty of fitness for a general purpose. Most courts have ignored the word "particular" in subsection (4) and have read it as though there were no implied warranty for any purpose where the article is sold by trade name. Where the former meaning has been adopted, however, the rule of the instant case has been in most cases applied. In Massachusetts a line of cases furnish precedent for the instant one,⁸ both in sales of foodstuffs and otherwise. The New York cases are likewise fairly uniform, especially since the decision handed down by Judge Cardozo in *Ryan v. Progressive Grocery Stores, Inc.*,⁹ a leading case on the issue involved. Other jurisdictions in recent cases have followed the lead offered by the Massachusetts and New York courts.¹⁰

The position of the Illinois courts on the same issue is doubtful. Like the majority of jurisdictions, Illinois, before the Sales Act, allowed recovery in food sales on an implied warranty of fitness for human consumption.¹¹ The rule was expanded to apply to sales of food in sealed packages in a case decided in 1915.¹² The sale was of a labeled tin of

⁸ *Parker v. Shaghalian & Co., Inc.*, 244 Mass. 19, 138 N.E. 236 (1923); *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); *Raymond Syndicate, Inc. v. American Radio & Research Corp.*, 263 Mass. 147, 160 N.E. 821 (1928).

⁹ 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339 (1931). See also *Foley v. Liggett & Meyers Tobacco Co., Inc.*, 241 N.Y.S. 233 (1930); *Bencoe Exporting & Importing Co., Inc. v. McGraw Tire and Rubber Co.*, 208 N.Y.S. 4 (1925).

¹⁰ *Giant Mfg. Co. v. Yates-American Mach. Co.*, 111 F. (2d) 360 (1940); *Sperry Flour Co. v. De Moss*, 141 Or. 440, 18 P. (2d) 242 (1933); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E. (2d) 130 (1936).

¹¹ *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1897); *Chapman v. Roggenkamp*, 182 Ill. App. 117 (1913).

¹² *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620 (1915).

herring, but the case was not decided under the Sales Act. An inkling of the probable tendency of the Illinois courts in trade-name sales is given in the case of *Bowman v. Woodway Stores, Inc.*,¹³ where the plaintiff sued for injuries resulting from the consumption of "Pet Milk." The Appellate Court there said in effect that a sale under a trade name did not preclude a recovery on an implied warranty of merchantability, but really decided the case on the theory that subsection (4) of the section of the Sales Act in question did not apply to foodstuffs, because to hold otherwise would be to render nugatory the provisions of the Illinois pure food statute.¹⁴ The case is not satisfactory authority on the issue here discussed. It was reversed by the Illinois Supreme Court¹⁵ on a finding that there was insufficient evidence as to the unwholesomeness of the milk. The possibility that Illinois would conform to the instant case is not indicated by its decisions in sales of merchandise other than foodstuffs. In sales by trade name, recovery has in most cases been precluded.¹⁶ However, the cases are not too recent, and in only one opinion, that of an appellate court,¹⁷ was it directly held that there was no warranty of merchantability; the rest of the cases seemingly ignored the possibility.

It seems, then, that of cases of sales of food by trade names the majority allow a recovery, and there is a tendency to adopt the more or less recent view of the instant case; that is, that the clause of the Sales Act precluding a warranty of fitness for a particular purpose in a sale by a trade name does not preclude a warranty of merchantability. Such a construction seems reasonable and desirable where a court is precluded by the express language of clause (4) of the section from implying a warranty of fitness for a particular purpose. In effect the court says that after all, a sale by trade name can nevertheless still be a sale by description so that the merchantability warranty clause applies, and that the two warranties, that of fitness for a particular purpose and that of merchantability co-exist, in the sale of foods.

J. HONOROFF

WILLS—DEVISE OR BEQUEST TO ATTESTING WITNESS—RIGHT OF LEGATEE, WHO WAS ONE OF TWO NECESSARY WITNESSES, TO LEGACY AFTER HE HAD LEFT STATE TO AVOID TESTIFYING AND WILL WAS PROVED BY OTHER MEANS—The case of *In re Walters' Estate*¹ presents a point apparently never before decided by any court in the United States. Here the plaintiff, a resident of New York, was one of the two attesting witnesses to the

¹³ 258 Ill. App. 307 (1930).

¹⁴ Ill. Rev. Stat. 1941, Ch. 56½.

¹⁵ *Bowman v. Woodway Stores, Inc.*, 345 Ill. 110, 177 N.E. 727 (1931).

¹⁶ *Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co.*, 242 Ill. 88, 89 N.E. 723 (1909); *Santa Rosa-Vallejo Tanning Co. v. Charles Kronauer & Co.*, 228 Ill. App. 236 (1923); *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N.E. 587 (1898).

¹⁷ *Santa Rosa-Vallejo Tanning Co. v. Charles Kronauer & Co.*, 228 Ill. App. 236 (1923).

¹ 285 N.Y. 158, 33 N.E. (2d) 72, 133 A.L.R. 1283 (1941).

will of her employer and also a legatee of the will. When the employer died, the plaintiff, knowing that she would lose her legacy if she testified to the execution of the will,² left New York and took up residence in Connecticut until after the will was probated. The court assumed that the purpose of the plaintiff in leaving was to avoid testifying.

The Surrogates' Court Act³ provides, "The death, absence from the state, or incompetency by reason of lunacy, or otherwise of a subscribing witness required to be examined as prescribed in this . . . section, or the fact that such witness cannot, with due diligence, be found within the state . . . may be shown by affidavit or other competent evidence, and when so shown to the satisfaction of the surrogate, the surrogate may by the decree or by order in writing, or by an order entered in the minutes dispense with his testimony. . . . Where the testimony of a subscribing witness has been dispensed with as provided in this section, and one subscribing witness has been examined, the will may be admitted to probate upon the testimony of such subscribing witness alone." Pursuant to this statute the surrogate dispensed with the testimony of the plaintiff, although her whereabouts were known, and admitted proof of the will by the remaining witness. Thereafter the plaintiff returned and demanded her legacy.

Her claim was based on the fact that since she did not testify to the execution of the will she did not come within the ambit of the statute and, therefore, the bequest made to her was not void. Both the Surrogate's Court⁴ and the New York Supreme Court, Appellate Division,⁵ denied this claim. The New York Court of Appeals, however, upheld the plaintiff's contention by the construction it placed upon the statute.⁶ The court said that since the will was in fact probated without the *testimony* of the plaintiff, under the letter of the law a legacy to an *absent* subscribing witness whose testimony is not required is not void. In other words, since the plaintiff did not actually testify to the execution of the will she may still claim her legacy.

The court states "the purpose of the statute is, first, to render the subscribing witness competent who would not have been so otherwise, and second, to guard against fraud in the preparation and execution of wills." It is unexplainable how the court in upholding the plaintiff's claim is guarding against fraud. Conspirators could make facile use of just such a scheme. Say that A and B conspire to forge a will in which they

² "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made." Cahill's Con. Laws, N.Y. 1930, Ch. 13, § 27.

³ Thompson's Laws of N.Y. 1939, Part II, P. 1998, Civ. Prac., Surr. Ct., § 142.

⁴ In re Walters' Estate, 15 N.Y.S. (2d) 8 (1939).

⁵ In re Walters' Estate, 21 N.Y.S. (2d) 37 (1940).

⁶ Cahill's Con. Laws, N.Y. (1930), Ch. 13, § 27.

would each receive a share of T's estate; T dies, and A leaves the state; B remains, testifies, and loses his legacy; A returns, receives his share and divides with B. No disinterested witness would be required.

It seems that the court in applying the letter of the law to this case completely overlooks the spirit of the statutes involved. The outstanding fact that the plaintiff voluntarily absented herself so she would not be compellable to testify appears to be immaterial to the court. The situation is far from appealing to equity and good conscience.

The court also states that if the applicable statutes were applied in any other way it would result in thwarting the intention of the testatrix to confer a benefit upon the witness without in any way promoting the purpose of the statute. Such a statement is not entirely correct. By denying the plaintiff her legacy the court would be promoting the second purpose of the statute, namely, to guard against fraud in the execution and preparation of wills. The court would be enforcing the absolute spirit of the law. It is true that, if the court denied the plaintiff her legacy, the intention of the testatrix would be thwarted in this respect. However, by denying the plaintiff her legacy, the court would be erecting a safeguard which would set a precedent for any like situation which might arise in the future. The loss to the plaintiff in this particular instance would be small in comparison to the benefits such an application of the statutes would have on future litigation concerning the same conduct of an attesting witness. Conspirators would know it would be folly to attempt to put themselves by means of fraud into the position of the plaintiff in the instant case.

But in all fairness to the court it must be said that perhaps the decision reached was motivated by the fact that the surrogate admitted the will to probate in the first place. Since the surrogate presumably could exercise discretion in dispensing with the testimony of the absent witness, the admission of the will would indicate that discretion had been exercised and that the surrogate felt that no fraud was being perpetrated by the plaintiff or anyone else. And since the will was admitted, the plaintiff should be allowed to take under it. Denying the plaintiff her legacy might under such circumstances result in thwarting the testatrix's intention to confer a benefit upon the plaintiff. However, even though this result may seem plausible in this case, the danger remains that it may set a precedent for future decisions which fail to take this into account.

However, the court could have reasoned that since at least two witnesses were required to attest the will, the statute required that not less than two witnesses stand ready to vouch for the facts essential to execution. Therefore, when one signs his name to the will as an attesting witness, he in effect is then declaring those essential facts to exist. The purpose of the testimony later before the surrogate could be regarded merely as substantiating what had already been done, and proof of the attesting witness's signature and the fact that he was present when the testator signed would justify the surrogate in treating the signature as testimony in itself that the will was genuine, that the testator was of

sound mind, etc. In other words, even though the witness is absent when the will is proved, that does not mean that the testimony given by his signature could be dispensed with so long as there are no additional witnesses to take his place. Since his signature was necessary, therefore, he cannot escape the effect of his signature's testimony and claim his legacy. Had the New York court desired to formulate a protective policy, then, it is submitted, it could by the foregoing reasoning have found that the plaintiff had forfeited her right to her legacy when she attested the will as one of two necessary witnesses.

Under the Illinois statutes, the conclusion of the New York court could not be reached, for under the Illinois Probate Act, it is the attestation (unless the will is otherwise duly attested by a sufficient number of witnesses) and not the testimony that would void the legacy. Hence, if one of the two witnesses to a will is also a legatee, he could not, by leaving the jurisdiction, preserve his legacy, although it may be granted that the will might be proved by the testimony of the other witness alone if he could prove the signing of the absent witness.

D. J. RYAN

WILLS — DUTY TO PRODUCE AND OFFER WILL FOR PROBATE — LIABILITY OF EXECUTOR-CUSTODIAN TO BENEFICIARIES FOR LOSS CAUSED BY NONPRODUCTION OF WILL WHERE CUSTODIAN WAS UNAWARE OF TESTATOR'S DEATH—In *Scholen v. Guaranty Trust Company of New York*,¹ the defendant trust company, who was named as executor in a will and was given custody thereof, failed to produce it on death of the testator because it did not have knowledge of his death. Four years later, after the estate had been distributed according to intestacy laws, the defendant produced the will. After probate thereof, the plaintiff, appointed administrator c.t.a., sued the defendant for damages caused by negligence in not promptly presenting the will for probate. On defendant's motion, the complaint was dismissed because there was no positive allegation that the defendant knew of the testator's death. The court held, in effect, that a custodian of a will has no affirmative duty to learn of the testator's death, even though he knows that he is named executor therein.

It is somewhat surprising to note that the action in the instant case, brought against the custodian-executor of the will for negligence in not producing it, is practically without precedent. There is little or no authority at common law for a successful suit against the custodian of a will for negligence in not producing it, in the absence of any misconduct on the part of the custodian. There are some cases holding that a custodian is liable in tort where he willfully suppresses or despoils a will.² It seems reasonable to hold that, where the custodian is not interested in

¹ 29 N.Y.S. (2d) 929 (1941).

² *Petitt v. Morton*, 38 Ohio App. 348, 176 N.E. 494 (1930); *In re Prentzel's Estate*, 11 Phila. 34 (1875); *Taylor v. Bennett*, 1 Ohio Circ. Dec. 57, 1 Ohio Circ. Ct. R. 95 (1885). See also *Tator v. Valden*, 124 Conn. 96, 198 A. 169 (1938), where action was brought by the person who suppressed the will.

the will and his only fault is in not ascertaining the death of the testator, he should not be liable in damages.

The court in the instant case felt that such a custodian is nothing more than a bailee who agrees to do no more than keep the will for the testator or bailor, or return it on demand, and who has no affirmative duties on the death of the bailor. Looking at the matter from a standpoint of the bailment relation between the testator and the custodian, the decision seems correct. The court cited a Massachusetts case,³ which, though the facts are not analogous, is authority for the point that the custodian, aside from some statutory change, is a mere bailee and owes no affirmative duties outside of the bailment contract. In that case, also brought against a depository bank which failed to produce the will for eight years after the death of the testator, the court held that in the absence of knowledge that the will was in its possession, the bank could not be held liable in negligence for not producing it, since a bailee is not responsible for the contents of a deposit when he has no knowledge of the nature of the contents.

Aside from statutory provisions, there seems to be no authority for adding a burden of vigilance on the custodian to determine the testator's death even though the custodian is also named executor in the will and has knowledge of his appointment. The courts agree that an executor has a duty to produce the will for probate. Statements to this effect, however, are based on statutory provisions creating this duty,⁴ or they are made incidentally in cases where the executor is suing for costs incurred in an attempt to probate a will,⁵ or they are dicta.

Statutes in most states put a positive duty on both the custodian and the executor to produce the will, and penalties are provided for failure or refusal to produce.⁶ Such penalties are usually a monetary amount for each month that the will is withheld, and are recoverable in civil actions by parties damaged by reason of the failure to produce. It is significant that the wording of such statutes does not make the custodian or executor liable until after knowledge of the death of the testator, and in the case of the executor, knowledge that he is named executor. In cases brought under such statutes,⁷ knowledge of these two facts was not in issue. One California case,⁸ brought under a statute giving a person injured a right to recover from the custodian all damages incurred, held that constructive knowledge of the existence

³ *Sawyer v. Old Lowell Nat. Bank*, 230 Mass. 342, 119 N.E. 825, 1 A.L.R. 269 (1918).

⁴ *In re Avery*, 117 Conn. 201, 167 A. 544 (1933); *Snyder v. Security-First Nat. Bank*, 31 Cal. App. (2d) 660, 88 P. (2d) 760 (1939); *Kelly v. Kennedy*, 133 Minn. 288, 158 N.W. 395, L.R.A. 1917A 448 (1916).

⁵ *In re Hawley's Estate*, 118 W. Va. 144, 189 S.E. 305 (1937); *Dodd v. Anderson*, 197 N.Y. 466, 90 N.E. 1137 (1910).

⁶ See Ann. Laws of Mass., Ch. 191, § 13 (General Laws of Mass., 1932); Rhode Island General Laws 1938, Ch. 572, § 5; Mich. Stat. Ann. 1938, Ch. 266, §§ 27.2631-2.

⁷ *Moore v. Smith*, 5 Me. 490 (1829); *Ahlborn v. Peters*, 37 Cal. App. (2d) 698, 100 P. (2d) 542 (1940); *Caulk v. Burt*, 112 Miss. 660, 73 So. 618 (1917).

⁸ *Snyder v. Security-First Nat. Bank*, 31 Cal. App. (2d) 660, 88 P. (2d) 760 (1939).

of the will might be implied, where the custodian was told through its agents to produce all the papers of the deceased but failed to produce the will.

It would seem, then, from the common law and the statutory provisions in the various states, that knowledge of the death of the testator is a prerequisite for the duty of the custodian to produce the will and that no common law action lies against such a custodian in the absence of a willful or tortious suppression of the will. This conclusion is substantiated somewhat by the attitude of at least two courts that the pertinent statutes are to be regarded as penal, and that no such action lies against a custodian at common law.⁹

Illinois has statutory provisions directed against the custodian,¹⁰ and the executor,¹¹ of the will, providing for a penalty of twenty dollars per month on the former, and for a disqualification of the latter. By the wording of the statute, the executor has no duty to produce until "thirty days after a person acquires knowledge that he is named as executor of a will of a deceased person." The statute creating the duty on the custodian does not specifically require knowledge on his part as to the death of the testator. It would, however, probably be construed to require such knowledge, since the penalty is directed against "any person *withholding* a will. . . ." and for the time it is "*wrongfully*" withheld. Then, too, in an Illinois case¹² brought for the statutory penalty, the court stated that such an action, although civil in form, was criminal within the meaning of the Constitution. The statement was made in connection with the question as to whether the defendant custodian could be forced to testify. It might suggest that since such an action is criminal in nature, knowledge of circumstances creating a duty, in this case death of the testator, would be required to make the defendant liable. It seems probable, then, that in Illinois, too, the instant case would be followed to the extent of requiring knowledge on the part of the custodian of the testator's death in order to hold such custodian for the statutory penalty.

J. HONOROFF

⁹ Richardson v. Fletcher, 80 Vt. 510, 69 A. 135 (1908); Rodisch v. Koethe, 178 Ill. App. 286 (1913).

¹⁰ Ill. Rev. Stat. 1941, Ch. 3, § 212.

¹¹ Ill. Rev. Stat. 1941, Ch. 3, § 214.

¹² Rodisch v. Koethe, 178 Ill. App. 286 (1913).